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In The

Supreme Court of the United States

October Term, 1970

No. 1320

LIVSHA SHAPIRO,

Petitioner,

vs.

EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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In The

SUPREME COURT OF THE UNITED STATES

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No.

LIVSHA SHAPIRO,

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vs.

EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

To the Supreme Court of the United States of America:

Petitioner respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of New Jersey rendered in these proceedings on November 9, 1970.

Opinion Below

The opinion of the Supreme Court of New Jersey, reported in 57 New Jersey 168, appears at Appendix A, infra, page 1a. The opinion of the Superior Court, Appellate Division of New Jersey, unreported, appears at Appendix B, p. 6a. The judgment of the Superior Court of New Jersey, Appendix C, appears at 9a.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on November 9, 1970, see Appendix A, page 1a, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of the Court is involved under 28 U.S.C. par. 1257(3).

The Questions Presented

I. Whether a State Court, in denying petitioner a plenary trial of material issues raised by the petitioner in the taking of her property summarily in condemnation proceedings, and dismissal thereof on appeal on ground of insubstantiality, is a proper federal question for the United States Supreme Court under the United States Constitution, Fourteenth Amendment?

A. Whether the petitioner has been denied due process when material issues, i.e., abuse of the power of Eminent Domain, arbitrary and discriminatory acts of condemnation, and unauthorized taking of petitioner's fee in her property, as private acts of the condemnor respondent, a Public Authority, for its utilities system, are tried summarily despite petitioner's request for a plenary trial?

II. Whether a State Court, in dismissing petitioner's appeal of denial of a plenary trial of material issues (supra), declaring that all issues were judicially determined conclusively, is a proper federal question for the United States Supreme Court where only a summary trial was held for the condemnation area?

4. Whether the violation of petitioner's constitutional rights by the taking of her property without any legal process whatsoever and without compensation, by the Public Authority (supra) in its extension of the said utilities system beyond the condemnation area contested by the petitioner (supra), is a proper federal question for the United States Supreme Court under the United States Constitution, Fourteenth Amendment?

Constitutional Provisions Involved

Constitution of the United States, Amendment XIV:

> "...nor shall any state deprive any person of life, liberty, or property without due process of law...."

Statement of the Case

Plaintiff, a public authority under the Municipal Utilities Law (N.J.S.A. 40:14B-1), brought this action to condemn part of the defendant's land for a sewer line in its utilities system in East Windsor Township, Mercer County, State of New Jersey (N.J.S.A. 20:1-1, et seq.), (N.J.S.A. 40:14B-34).

Service upon defendant on May 20, 1969 included with plaintiff's complaint a declaration of taking with attached plan of proposed system over defendant's land and a request for appointment of three condemnation commissioners to make an appraisal of defendant's land taken and fix compensation therefore, and a deposit.

Defendant moved by Notice of Motion served on plaintiff on June 26, 1969 to dismiss the plaintiff's complaint for lack of jurisdiction due to abuse of the power of eminent domain, arbitrary and discriminatory acts of the plaintiff, resulting in the taking of the defendant's fee in the said property without due process of law, as private acts of the plaintiff, and attached a Memorandum of Law in support thereof. A temporary restraining order signed July 14, 1969 prohibiting plaintiff from proceeding upon defendant's land was granted to the defendant.

Plaintiff moved by Notice of Motion served on defendant on July 16, 1969 to dismiss the defendant's Motion, and attached an affidavit of Robert Jamieson, an engineer and surveyor, in support thereof.

The trial judge on August 8, 1969 summarily dismissed defendant's Motion in its entirety without, in effect, granting defendant a plenary trial with a jury to hear the issues raised herein as requested, and he lifted the Restraining Order and appointed the condemnation commissioners as requested in the Complaint.

The plaintiff thereupon proceeded to construct its utilities system upon defendant's land, causing waste and destruction thereon. A swath through defendant's woods in area marked "X" (R2, D6a)[1] had previously been cut without knowledge or consent of the defendant and abandoned, by the plaintiff.

---

1. "R" refers to Record Listing certified by the Clerk of the Supreme Court of New Jersey and filed with this petition.

Defendant filed Notice of Appeal of said judgment on September 8, 1969 with the Clerk of the Appellate Division, Superior Court of New Jersey. However, plaintiff continued construction of its utilities system beyond the area described in the plaintiff's complaint, without any legal process or consent of the defendant, causing waste and destruction.

At the argument of the said Appeal before the Appellate Division on February 24, 1970, the plaintiff declared to the Court that it had already installed a water and sewer system on defendant's land, and introduced two maps Nos. 18 and 19, showing the locations of the utilities thereon, (R5, D4a). The plaintiff also informed the Court, as it had stated in its brief on said Appeal, that it is going to build a pumping station thereon, and that the defendant is prohibited from erecting any structures on the land taken from the defendant for the plaintiff's utilities system. The defendant had already objected in its Motion, Memorandum and Brief (Point III), on appeal to the Appellate Division that the plaintiff's taking constituted a taking of the defendant's fee, and was unauthorized and unconstitutional.

The said maps of the plaintiff, Nos. 18 and 19 (R5, D4a), indicate the area of the land of the defendant used for the plaintiff's utilities system according to the plaintiff. This area taken by the plaintiff is not the same area which was presented to the Superior Court, Law Division, for condemnation, viz., the water and sewer lines constructed are shown (northerly) of the "centerline." The red line on the defendant's overlay map segment (R5, D5a) is the line of the proposed condemnation

area of the plaintiff. The actual constructions are, as plaintiff stated to the Court on February 24, 1970, in black lines on said maps Nos. 18 and 19. The constructed sewer line extends southerly across Wycoff's Mills Road on defendant's property and the water line diverges in a northeasterly direction across defendant's land north of the "centerline." In addition, in the belief of the defendant, a branch of the said water line cuts across defendant's land parallel to, and about 30' distant from, the sewer line, and north of it, with the insertion of a fire hydrant near the road. This branch does not appear on said maps Nos. 18 and 19. The said water and sewer lines constructed on defendant's land are not included in plaintiff's suit for condemnation herein and includes land taken from the defendant without any legal process. In addition, the plaintiff has widened Wycoff's Mills Road in the area 15' for approximately 200' where said lines cross the said road; the grade of the abutting land of the defendant has been lowered, farmland destroyed and soil removed, and obstructing access to the defendant's property.

The easterly extension of Wycoff's Mills Road is without any utilities system of water and sewer for the abutting owners, including the defendant, but the southerly course of said system turns off to the right, southerly, and proceeds along the eastern boundary of the Hageman property, benefitting the plaintiff's appraiser who has an interest therein, without bisecting the Hageman property.

The Decision of the Appellate Division, Appendix B, p. 8a), affirmed the judgment of the trial Court entered on August 29, 1969, dismissing defendant's Motion to Dismiss the Complaint with-

out, in effect, giving extended treatment to defendant's Point III of her brief which presents objections to plaintiff's taking of defendant's property in condemnation on constitutional grounds, without due process of law, and to the taking of additional property of the defendant in its extension of said utilities system without any legal process.

The Supreme Court of New Jersey dismissed the petitioner's appeal of the Appellate Division's decision on the grounds of lack of substantiality of issues presented by the petitioner, and that the cause was judicially determined conclusively (Appendix A, p. 3a et seq.). Thus, in effect, the petitioner was denied her right to a plenary hearing on the material issues, supra, with the right to cross-examine the respondent's witnesses and present additional evidence. The petitioner is deprived of the fee in her property in the condemnation proceedings, and deprived of her property in the extension of respondent's utilities system without any legal process or compensation. In effect, this affirmed the trial court's judgment and its affirmation by the Appellate Division, that the petitioner was not deprived of due process of law.

The present petition for a writ of certiorari is from that decision of the Supreme Court of New Jersey.

Reasons for Granting the Writ

I. The constitutional rights of the petitioner under the Fourteenth Amendment of the United States Constitution are violated when her property is taken summarily in condemnation proceedings without a plenary trial of the issues and dismissal of appeal thereof because of lack of substantiality of material issues.

The United States Constitution prohibits the taking of property without due process of law, United States Constitution, Fourteenth Amendment. The Fourteenth Amendment is a limitation upon the States acting in violation of the United States Constitution, Fallbrook Irrig. Dist. v. Bradley, 164 U.S. 112, 154-5; Hairston v. Danville & W.R. R. Co., 208 U.S. 598, 606; Cole v. La Grange, 113 U.S. 1, 5; Truax v. Corrigan, 257 U.S. 312, 324, 329; Liner v. Jafco Inc., 375 U.S. 301; Thompson v. City of Louisville, 362 U.S. 199, 206; Davidson v. New Orleans, 96 U.S. 97, 105.

The New Jersey Supreme Court, in dismissing the petitioner's appeal, states "...if the asserted question is only remotely or speciously connected to the constitution...then there is no appealability" (Appendix A, p. 4a), and that "before defendant's constitutional points are palpably insubstantial"(idem, p. 5a). However, the United States Supreme Court may pass on the grounds of substantiality, Angel v. Bullington, 330 U.S. 183, 188, 190; Thompson v. City of Louisville, supra, 203; Truax v. Corrigan, supra at 324, 325, 328, 329-332; and may reverse the State court's interpretation of the United States Constitution, Chicago

etc. R.R. v. Chicago, 166 U.S. 226, 233-4; Colorado v. Continental Air Lines, 372 U.S. 714, 716; WHYY Inc. v. Borough of Glassboro ugh, N.J., 393 U.S. 117, 119, 120; Thompson v. City of Louisville, supra at 206.

The denial of the petitioner's rights under the United States Constitution were specifically asserted in the State courts and brought to their attention, initially in her motion to dismiss the trial court (R2, D13a), then on appeal before the New Jersey Superior Court, Appellate Division (R3, pp. 15 et seq.), and again before the New Jersey Supreme Court (R4, pp. 6 et seq.). The petitioner continuously asked, in effect, for a plenary trial with a jury, of the issues that appeared material, but was refused. These material issues included the unauthorized taking of the petitioner's property through condemnation in a summary proceeding, and are not "remotely or speciously connected to the Constitution" (Appendix A, p. 4a), but are immediate and fundamental. The denial of petitioner's appeal, therefore, is not a mere " ...shibboleth mouthing of constitutional phrases like "due process of law" (Appendix A, p. 1a), or "frivolous", idem. It is a denial to the petitioner of a basic concept of freedom in a republic sanctioned by the United States Constitution, Chicago etc. R.R. v. Chicago, supra at 232.

The petitioner respectfully submits that the appeal to the New Jersey Supreme Court should not have been dismissed, the issues being substantial.

A. It is not due process when material issues, viz., abuse of Eminent Domain, arbitrary and discriminatory acts of condemnation and unauthorized

taking of the fee in her property, as private acts of the condemnor respondent, a Public Authority, for its utilities system, are tried summarily despite petitioner's request for a plenary trial. Due process is a judicial determination of all questions raised in condemnation, Chicago etc. R.R. v. Chicago, supra, 242; Marchant v. Penn. R.R., 153 U.S. 380, 387; Davidson v. New Orleans, 96 U.S. 97, 105; Kennard v. Morgan, 92 U.S. 480, 483; WHYY Inc. v. Borough of Glassborough, N.J., supra, 120; Willner v. Committee on Character & Fitness, 373 U.S. 96, 103-4. Due process of law is a matter of substance, not merely form, Fallbrook Irrig. Dist. v. Bradley, supra, 150; Georgia v. Chattanooga, 264 U.S. 472, 483.

In raising the issue of abuses of Eminent Domain, viz., bad faith in the condemnor respondent's allegations according to "Deed" of bearings of petitioner's land taken contested by the petitioner; non-disclosure of part ownership by respondent's appraiser and right of way agent in these condemnation proceedings, of his adjoining land which raises a question of conflict of interest, for the respondent's utilities now constructed run along the edge of his property of about 20 acres with numerous tie-ins denied to the petitioner, carefully aligned to avoid bisecting his land while bisecting petitioner's land. These material issues were adjudged summarily against the petitioner without in effect granting the petitioner a plenary trial as requested, thus precluding a petitioner an opportunity to be heard, to examine and cross-examine respondent's witnesses and submit additional evidence. So too, the taking of the fee in additional land of the petitioner without compensation, arbitrarily and discrimina-

torily, benefitting the said appraiser rather than for the common use of all abutting owner's of land, including the petitioner's adjacent land, is a material issue which these summary proceedings in effect denied petitioner an opportunity to be heard in a plenary trial. Truax v. Corrigan, supra, 329, 331-5.

Similarly, the taking of another's property in condemnation for the private use of another through the right of "public use" is a material issue which due process dictates that the petitioner be given the opportunity to be heard in a plenary trial as requested, Missouri Pacific R.R. Co. v. Nebraska, 164 U.S. 403, 417; Hairston v. Danville & W.R.R. Co., supra, 606-7; Fallbrook Irrig. Dist. v. Bradley, supra, 153, 158, 161, 163-3, 166; Cole v. La Grange, supra, 8; Thompson v. Consolidated G. V. Corp., 300 U.S. 55, 80. The taking by an instrumentality of a State, i.e., Public Authority, which is not the alter ego of the State but an independent agency, and its unauthorized acts, are private and unprotected by the laws of Eminent Domain, Colorado, ex rel Watrous v. Dist. Court, 207 P(2d) 50, 57. These issues were placed before the courts herein, but petitioner was denied a plenary hearing therefore and her appeal dismissed.

The lack of an opportunity for a plenary hearing of these issues should not have been dismissed as insubstantial, and, it is submitted, was a denial of the petitioner's constitutional right to be heard under the due process clause of the United States Constitution, Fourteenth Amendment.

II. It is not due process when petitioner's appeal of denial of a plenary trial of the material issues, supra, is dismissed by the State court declaring

in effect that all the issues were judicially determined conclusively in the summary proceeding (Appendix A, p. 3a). There must be a full opportunity to be heard on the issues, Chicago etc. R.R. v. Chicago, supra, 234, 235, 240,-1-2; Georgia v. Chattanooga, supra, 484. In determining what is due process regard must be had to the substance and not form, Chicago etc. R.R. v. Chicago, supra, 235; Georgia v. Chattanooga, supra, 483-4; Davidson v. New Orleans, supra, 105. "... If the decision of that [State] court shall deny ... any rights secured ... by the Constitution and laws of the United States, the case may be brought here for re-examination and review," Georgia v. Chattanooga, supra, 284.

The New Jersey Supreme Court dismissed the petitioner's appeal of a hearing of the material issues because, in effect, the summary trial herein was held to be a conclusive judicial determination (Appendix A, p.3a). The petitioner submits that a summary hearing in which the answer of the respondent to the petitioner's motion to dismiss the complaint was one witness' affidavit, and no opportunity for the petitioner to cross-examine him or any other witness or to present additional evidence as would be available at a plenary trial with a jury as requested, is not a conclusive judicial determination nor due process within the context of the United States Constitution under the Fourteenth Amendment, and is a deprivation of the petitioner's rights.

In addition, the presentation by the respondent to the court, and thus into the record, at the appeal to the Appellate Division, Superior Court of New Jersey, for the first time, its maps No. 18 and No.

19 (R5, p. 4a) show its extention of the constructed water and sewer line on petitioner's adjacent land entirely different from the original condemnation area. The petitioner's overlay map (R5, p. 5a) clearly points out the variance, i.e., the condemnation area south of the "centerline"; the actually constructed utilities system are north of the "centerline" (R2, p. D8a-9, 26; p. D10a). Nevertheless, these facts were in no way alluded to at the trial court. It is submitted that this is a material issue requiring a plenary action with a jury to conform with the due process clause of the United States Constitution.

A. The taking of the petitioner's property without any legal process whatsoever, without compensation, by the respondent Public Authority in its extension of its utilities beyond the condemnation area is a clear violation of the petitioners Constitutional rights under the Fourteenth Amendment, Chicago etc. R.R. v. Chicago, supra 241; Hairston v. Danville & W.R.R. Co., supra, 607; Davidson v. New Orleans, supra, 105. A notice and hearing are required with an opportunity to be heard to meet the requirements of due process, Georgia v. Chattanooga, supra, 483-4; Chicago etc. R.R. v. Chicago, supra, 234-241. The final judgment of a State court is enjoined by the due process requirement of the Fourteenth Amendment where property is taken without any compensation, Chicago etc. R.R. v. Chicago, supra, 247; Marchant v. Penn. R.R., supra.

The act of a Public Authority in taking private property in an alleged condemnation proceeding without compensation is unauthorized and unlawful, Colorado, ex rel. Watrous v. Dist. Court, supra,

57, 58. The said maps Nos. 18 and 19, and petitioner's overlay map thereof, clearly show an area of land taken from the petitioner for construction by the respondent different from that of the original condemnation area. Such taking is in violation of the due process requirements of the United States Constitution, Fourteenth Amendment. It is submitted that this aspect of petitioner's appeal to the New Jersey Supreme Court was not judicially determined conclusively.

Conclusion

For these reasons, a writ of certiorari should issue to review the opinion and judgment of the Supreme Court of New Jersey.

Respectfully submitted,

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Attorney of Record for Petitioner

s/ Paul Shepard,
Attorney for Petitioner

January 28, 1971

APPENDIX A

Opinion of the Supreme Court of New Jersey

(Filed 11/9/70)

In the Matter
of
EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Plaintiff-Respondent,

v.

LIVSHA SHAPIRO,

Defendant-Appellant.

On appeal from the Superior Court of New Jersey, Appellate Division.

Argued September 28, 1970. Decided NOV-9, 1970

Mr. Paul Shepard, a member of the New York Bar and attorney pro hac vice, argued the cause for defendant appellant (Mr. Daniel J. Lyons, Jr., attorney).

Mr. Irving Friedman argued the cause for plaintiff-respondent.

The opinion of the Court was delivered by

SCHETTINO, J.

Appendix A

Opinion of the Supreme Court of New Jersey

Plaintiff, a duly created public body exercising the power of eminent domain, N.J.S.A. 40:14B-34, instituted this condemnation proceeding against defendant, seeking to obtain an easement over a part of her property to construct a sanitary sewer system and water lines.

After complying with the pertinent statutory provisions, N.J.S.A. 40:14B-35, 36, 37, plaintiff moved for an order to show cause for the appointment of condemnation commissioners. On the return date of that order, defendant moved to dismiss plaintiff's complaint. Upon affidavits and oral argument, the trial court decided the parties' respective cross motions; it denied defendant's motion for dismissal of the complaint, and granted plaintiff's motion for the appointment of condemnation commissioners.

Defendant appealed to the Appellate Division. Charging that plaintiff had abused its condemnation powers and had acted fraudulently, in bad faith, and from improper motives, she contended that the instant condemnation proceeding constituted an arbitrary taking of her property without due process of law. She also argued that the trial court's action deprived her of a plenary trial before a jury on these issues.

The Appellate Division disagreed. In a per curiam opinion, it concluded that the trial court properly entered judgment for plaintiff. Explaining its finding that no genuine issue of material fact existed in the record, the Appellate Division noted:

Appendix A

Opinion of the Supreme Court of New Jersey

> We have searched the record in vain for anything to support defendant's charges .... All we have are numerous assertions by counsel for defendant, principally as to matters of an engineering nature, without any supporting affidavits from experts. The only proofs in the record as to the need, location, and quality of easement required, come from plaintiff's experts.

The Appellate Division thus found that the trial court correctly determined that the evidence failed to disclose that plaintiff in the selection of its proposed route was motivated by fraud, bad faith, or other manifest abuse of its accorded power of eminent domain. Texas Eastern Trans. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966); City of Trenton v. Lenzner, 16 N.J. 465, 473, 481 (1954), cert. denied, 348 U.S. 972 (1955); City of Newark v. N.J. Turnpike Authority, 7 N.J. 377, 380, 382, 385, appeal dismissed, 342 U.S. 874 (1951).

From the unanimous opinion of the Appellate Division, defendant appeals purportedly as of right, ostensibly pursuant to N.J. Const., Art. VI, § V, par. 1(a), and R. 2:2-1(a)(1), as presenting a substantial constitutional issue.

We have long held that an appeal as of right is maintainable only where the record reveals a substantial rather than merely a colorable question arising under the federal or state constitutions that has not been the subject of a conclusive

judicial determination. Essex County v. Hindenland, 24 N.J. 517 (1957); State v. Radowitz, 21 N.J. 428, cert. denied, 352 U.S. 856 (1956); Klotz v. Lee, 21 N.J. 146 (1956); Colacurcio Contracting Corp. v. Weiss, 20 N.J. 255 (1955); State v. De Meo, 20 N.J. 1 (1955); State v. Greenberg, 16 N.J. 568 (1954); State v. Caprio, 14 N.J. 64 (1953), cert. denied, 347 U.S. 952 (1954); State v. Pometti, 12 N.J. 446 (1953); Starego v. Sobolinski, 11 N.J. 29 (1952).

We have defined the concept of substantiality with great particularity, saying,

> It is clearly not enough if the asserted question is only remotely or speciously connected to the constitution by the loose or contrived use of broad constitutional terminology. Shibboleth mouthing of constitutional phrases like "due process of law" and "equal protection of the laws" does not ipso facto assure absolute appealability.
>
> * * *
>
> In addition, there must appear indication of true merit from the constitutional point of view, i.e., that the issue tendered is not frivolous and has not already been the subject of a conclusive judicial determination.

Tidewater Oil Co. v. Mayor and Council of Carteret, 44 N.J. 338, 342 (1965).

Appendix A

Opinion of the Supreme Court of New Jersey

Defendant's constitutional points are palpably insubstantial. There was no right of appeal. Defendant was required to petition for certification. Had the course been taken, the petition for certification would have been denied because there is no merit in the issues defendant seeks to project. Had plaintiff moved before argument to dismiss the appeal, the motion would have been granted.

The appeal is accordingly dismissed.

A TRUE COPY

s/ John H. Gildea
CLERK

APPENDIX B

Opinion of Superior Court of New Jersey
(Filed 3/5/70)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-32-69

EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Plaintiff-Respondent,

v.

LIVSHA SHAPIRO,

Defendant-Appellant.

Argued February 24, 1970 — Decided MAR 5 '70

Before Judges Sullivan, Carton and Halpern.

On appeal from Superior Court, Law Division, Mercer County.

Mr. Paul Shepard argued the cause for appellant (a New York attorney appearing pro haec vici) (Mr. Daniel J. Lyons, Jr., attorney).

Mr. Irving Friedman argued the cause for respondent.

PER CURIAM.

Plaintiff, a duly created public body under the

Appendix B

Opinion of Superior Court of New Jersey

Municipal Utilities Authority Law (N.J.S.A. 40:14B-1), filed a condemnation suit to acquire an easement over a portion of defendant's property to install and maintain water and sewer lines. As required by law, a declaration of taking and a money deposit were also filed.

Simultaneous with the return day of the order to show cause for the appointment of commissioners, defendant moved to dismiss the condemnation proceedings "on the ground that this court had no jurisdiction, that there has been abuse of the power of eminent domain, there has been arbitrary and unreasonable taking of defendant's property and a violation of due process of law." Defendant was granted a temporary restraint and after several adjournments the cross-motions for relief were heard by the court, on affidavits and oral argument, on August 8, 1969. The court denied defendant's motion, removed the temporary restraint, and granted plaintiff's request for the appointment of commissioners. This appeal followed.

Since plaintiff has the power to condemn, the amount of land to be taken and its location lies within its discretion. "The exercise of that discretion will not be interfered with by the courts in the absence of fraud, bad faith or circumstances revealing arbitrary or capricious action." Texas Eastern Trans. Corp. v. Wildlife Preserves, Inc., 48 N.J. 261, 269 (1966).

We have searched the record in vain for any-

Appendix B

Opinion of Superior Court of New Jersey

thing to support defendant's charges that plaintiff (1) abused its condemnation powers; (2) it was guilty of improper motives, bad faith, and fraud; and (3) a conflict of interest existed on the part of its appraiser who had an interest in property adjoining defendant's. All we have are numerous assertions by counsel for defendant, principally as to matters of an engineering nature, without any supporting affidavits from experts. The only proofs in the record as to the need, location, and quantity of easement required, came from plaintiff's experts. We find no basis in fact, or law, for defendant's contentions requiring a trial thereof.

Finally, defendant now contends that he is entitled to a trial by jury on the issues presented. We disagree. Issues concerning the right to condemn, location, good faith and like preliminary matters may be determined in a summary manner before the appointment of commissioners. N.J.S.A. 20:1-2; R. 4:73-1; R. 4:67-1; Bergen County v. Hackensack, 39 N.J. 377 (1963); State v. New Jersey Zinc Co., 40 N.J. 560, 572 (1963).

Affirmed.

APPENDIX C

Order Appointing Commissioners

(Docketed 8/29/69)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — MERCER COUNTY
DOCKET NO. L-29237-68

In the Matter of the Application of the EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY to Fix the Compensation to be Paid for the Lands of MOO TUCK NG and WAH WONG TUCK NG, his wife; GEORGE A. REDMOND and MADELINE N. REDMOND, his wife; ROMA SAVINGS AND LOAN ASSOCIATION, Mortgagee; LIVSHA SHAPIRO, Unmarried; MAX ZEITZ and BETTY S. ZEITZ, his wife; MARY E. GERTZEL, widow; AUGUST GERTZEL and RUTH GERTZEL, his wife, Lien Claimants, to be Taken for Public Use.

This matter being opened to the Court by Irving Friedman, Attorney for Plaintiff, and Paul Shepard, Esquire, appearing for the Defendant, Livsha Shapiro, unmarried, and having filed a Notice of Motion to Dismiss the Complaint as to Livsha Shapiro, and no one appearing for the other defendants on the return of an Order to Show Cause why commissioners should not be appointed to examine and appraise the lands and properties of the said MOO TUCK NG and WAH WONG TUCK NG, his wife; GEORGE A. REDMOND and MADELINE N. REDMOND, his wife; ROMA SAVINGS AND LOAN ASSOCIATION, Mortgagee; LIVSHA SHAPIRO, unmarried; MAX ZEITZ and

Appendix C

Order Appointing Commissioners

BETTY S. ZEITZ, his wife; MARY E. GERTZEL, widow; AUGUST GERTZEL and RUTH GERTZEL, his wife, Lien Claimants, defendants, more particularly set forth in the Complaint heretofore filed in this action, and also to assess the damages sustained by the taking of an easement upon such lands and property for public use, and it appearing to the Court that such Order to Show Cause has been duly served and for good cause showing, and the Court having heard and considered the arguments of Counsel;

It is on this 15th day of August 1969 ORDERED that three disinterested Freeholders and residents of the County of Mercer, John Schlossberg, Esquire, Daniel A. O'Donnell, Jr., Esquire, and Remo Bonanni, Realtor, all of Trenton, New Jersey, be and they are hereby appointed commissioners to examine and appraise the land and premises described in the Complaint, and to assess the damages to be sustained by the taking and condemning of an easement upon the said lands and premises for public use for the purpose of a right-of-way for a sanitary sewer main and water line as set forth in said Complaint;

It is further ORDERED that the motion to dismiss the Complaint against Livsha Shapiro is denied and that the Restraining Order dated July 14, 1969, restraining the plaintiff from entering on or taking possession of the lands of the said defendant Livsha Shapiro, is hereby lifted.

Appendix C

Order Appointing Commissioners

It is further ORDERED that a written notice of the time and place when and where the commissioners will meet to examine and appraise the property and to assess the damages sustained by its condemnation be served upon each of the persons interested who reside in the State of New Jersey, personally or by leaving the same at his or her residence with a member of the household, above the age of 14 years, at least 14 days before the date set for the hearing, or that such written notice be served upon the attorneys for the said interested persons by delivering the same to his business office at least the same number of days before the date set for the hearing;

It is further ORDERED that said commissioners file their report with the Court on or before the 15th day of November 1969.

s/ A. A. Salvatore
J.S.C.

I hereby certify that the foregoing is a true copy of the original on file in my office.

s/ Mortimer G. Newman, Jr.
Clerk